

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM VINCON MADISON,

Defendant-Appellant.

UNPUBLISHED

August 25, 2000

No. 215671

Muskegon Circuit Court

LC No. 97-041435-FH

Before: McDonald, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment without parole for the first-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. His motion for a new trial was denied. He appeals as of right. We affirm.

Defendant's convictions arise from the shooting death of Tawone Love, who was shot several times in the vicinity of Spring and Catherine Streets in Muskegon, a high drug trafficking area. The shooting was observed by several people who were in the area selling and purchasing narcotics. Defendant, along with codefendants Henry Dontee Allen and Tyree Edwards were identified as having shot the victim. Defendant was tried jointly with codefendant Allen, before separate juries. Edwards pleaded guilty to second-degree murder and, at trial, claimed sole responsibility for the shooting.

At trial, several witnesses testified inconsistently with prior statements that they had given and their prior statements were admitted for impeachment purposes. Tyree Edwards' trial testimony claiming sole responsibility for the shooting was likewise inconsistent with a prior recorded statement he had given to the police and his prior statement was also admitted for impeachment purposes. The trial court gave a cautionary instruction advising the jury on the limited use of Edwards' prior statement immediately before admitting that statement, but did not give a similar limiting instruction before other witnesses were impeached with prior inconsistent statements. The court also instructed the jury on the limited use of prior inconsistent statements during its final charge to the jury.

On appeal, defendant argues that the trial court erred in failing to sua sponte provide a limiting instruction each time a witness was impeached with a prior inconsistent statement. Defendant argues that the limiting instruction given just before the introduction of Edward's prior inconsistent statement and the general limiting instruction given during the final jury instructions were insufficient to eradicate from the minds of the jurors the evidentiary facts contained in the numerous prior inconsistent statements, especially considering the length of the trial and the large number of witnesses. Defendant therefore contends that it is probable that the jury impermissibly considered impeaching evidence as substantive evidence, a distinction that he also believes was not sufficiently defined. Defendant likewise argues that trial counsel was ineffective for not timely requesting a limiting instruction each time a prior inconsistent statement was introduced. We disagree.

Where no request has been made for a limiting instruction on the use of prior inconsistent statements, the general rule is that relief will not be given when there is no demonstration or likelihood of prejudice and where neither the court nor the prosecutor suggested to the jury that prior inconsistent statements could be used as substantive evidence. *People v Hodges*, 179 Mich App 629, 632; 446 NW2d 325 (1989). To the extent defendant also challenges the adequacy of the court's cautionary instruction with regard to Edwards' prior statement, his failure to object to the instruction at trial precludes appellate relief absent manifest injustice. *People v Joseph*, 237 Mich App 18, 25; 601 NW2d 882 (1999).

Defendant's reliance on *United States v Duff*, 332 F2d 702 (CA 6, 1964), is misplaced. In *Duff*, the court determined that the witness' trial testimony had no bearing on the case and, therefore, it was error to admit the witness' prior statements. *Id.* at 706-707. In contrast to the situation in *Duff*, the trial testimony of the various witnesses in this case was directly probative of the issue of defendant's guilt or innocence and, therefore, the prior inconsistent statements by these witnesses could properly be considered for impeachment purposes.

Further, we find without merit defendant's claim that the cautionary instruction given to the jury was not sufficiently adequate to properly inform the jury that the prior inconsistent statements were not to be used as substantive evidence. Where the jury is told that it "could not use evidence of prior inconsistent statements of the witness as substantive evidence, but rather could only use such statements in assisting it in determining whether the witness was truthful," the trial court has properly cautioned the jury. *People v Avant*, 235 Mich App 499, 511; 597 NW2d 864 (1999); *People v McIntire*, 232 Mich App 71, 113; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147; 599 NW2d 102 (1999). Here, the trial court's cautionary instruction was similar to that found proper in *Avant*. We find no record support for defendant's claim that the jury did not adhere to the instructions it was given. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Accordingly, considering that the witnesses' prior statements were admissible for impeachment purposes, that neither the trial court nor the prosecutor suggested to the jury that the prior statements could be used as substantive evidence, and that the trial court properly instructed the jury on the limited use of such evidence in its final charge to the jury, we find no merit to defendant's claim that he was denied a fair trial because the court's failed to sua sponte provide a limiting instruction immediately

before each prior inconsistent statement was introduced. See *People v Paul Mathis*, 55 Mich App 694, 696-697; 223 NW2d 310 (1974).

Defendant further argues that he was denied the effective assistance of counsel by counsel's failure to timely request a limiting instruction before each prior inconsistent statement was introduced. Where a defendant argues that he was denied the effective assistance of counsel by counsel's failure to request a jury instruction, he must demonstrate, beyond mere conclusory statements, that counsel's conduct prejudiced defendant or did not constitute sound trial strategy. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994); *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). To demonstrate prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Because the jury was properly and instructed on the limited use of prior inconsistent statements, and there was no suggestion by either the trial court or the prosecutor that prior inconsistent statements could be used as substantive evidence, we conclude that defendant has failed to demonstrate a reasonable probability that the result of the trial would have been different had a limited instruction been immediately provided in each instance.

Finally, we reject defendant's claim that the court erred in admitting a statement under the excited utterance exception to the hearsay rule. MRE 803(2). The decision whether to admit or exclude evidence is within the trial court's discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). Here, there is no question that the declarant's statement related to a startling event. Further, the record discloses sufficient factual support for the court's foundational determination that the declarant had not calmed down enough to have the reflective capacity for fabrication, but rather, was still under the stress of the excitement caused by the event when the statement was made. *People v Smith*, 456 Mich 543, 550-551; 581 NW2d 654 (1998). Thus, the trial court did not abuse its discretion in admitting the statement. *Id.* at 552.

Affirmed.

/s/ Gary R. McDonald

/s/ Janet T. Neff

/s/ Brian K. Zahra